



OFFICE OF THE DEPUTY COMMISSIONER - LEGAL MATTERS

LEGAL BUREAU BULLETIN

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- I. SUBJECT:** RIGHTS OF OBSERVERS TO RECORD POLICE OFFICERS
- II. QUESTION:** IS IT PERMISSIBLE FOR A CIVILIAN TO OBSERVE AND RECORD A POLICE OFFICER IN THE PERFORMANCE OF THE OFFICER'S DUTY?
- III. ANSWER:** YES. CITIZENS HAVE A CONSTITUTIONAL RIGHT TO OBSERVE AND RECORD POLICE OFFICERS CARRYING OUT THEIR DUTIES. CITIZENS ALSO HAVE THE RIGHT TO MONITOR AND CRITICIZE THE POLICE. CITIZENS DO NOT HAVE THE RIGHT TO INTERFERE WITH OR PREVENT A POLICE OFFICER FROM PERFORMING AN OFFICIAL FUNCTION.

IV. DISCUSSION

A. Introduction

Courts have consistently held that it is not unlawful to record police officers carrying out their duties and to criticize police activity, even if that criticism includes profane, insulting, or demeaning language. However, there are restrictions that prohibit an individual from engaging in actual interference with police activity.

The purpose of this Bulletin is to provide guidance to police officers on:

- The rights of individuals to record and/or criticize police action;
- How to respond when confronted with activities that do not rise to the level of a crime or violation;
- How to determine when the activity amounts to interference with police duties and the recommended proportional response to such interference; and
- Under what circumstances it is permissible to seize recordings or recording devices, as well as guidance on supervisory review.

B. The Right to Record Police Activity

Individuals have a right to lawfully record police activity including, but not limited to, detentions, searches, arrests, or uses of force. This right extends to those individuals in both public places, such as streets, sidewalks, and parks, *and* private property such as a building, lobby, workplace, or an individual's own property, providing the individual has a legal right to be present at that location. An individual's recording of police activity from a safe distance without any additional action intended to obstruct the officer or threaten public safety does not amount to interference. Further, an individual's conduct does not amount to interference if he or she expresses criticism of the police or the police activity being observed.¹

C. Prohibited Responses to Individuals Observing or Recording Police Activity

Police officers may **NOT** order an observer to stop recording or disperse, arrest an observer for Obstructing Governmental Administration ("OGA"), or seize a recording device in any of the following situations:

- Observer is taking photographs, videotaping, or making a digital recording;
- Observer is requesting or making note of shield numbers or names of members of the service;
- Observer is criticizing the police or objecting to police activity; or
- Observer is using crude or vulgar speech.

Recognizing the affirmative right to record police action, **UNDER NO CIRCUMSTANCES** should a Member of the Service:

- Threaten, intimidate, or otherwise discourage an observer from recording the police officer's activities, assuming the observer is at a safe distance;
- Intentionally block or obstruct cameras or other recording devices when there is no legitimate law enforcement reason to do so; or
- Delete any pictures or videos from the observer's camera, or order observer to delete such pictures or recordings.

D. Interference with Police Activity and How to Respond Appropriately

A person may record public police activity unless the person engages in actions that jeopardize the safety of the officer, the suspect, or others in the vicinity; violate the law; or incite others to violate the law.² However, an individual's right to record police action is not absolute if it amount to actual obstruction of a police officer's investigation. Examples of this might be tampering with a witness or persistently engaging an officer who is in the midst of performing his or her duties.³ Therefore, in order for such conduct to reach the requisite level of interference, there must be some additional activity (other than video recording or criticism) that leads to an *actual* interference with the performance of an official police function.

Interference involves using actual physical force or intruding into the "zone of safety" established by the officer in the performance of his or her duties. This zone of safety should be established on a case-by-case basis by the police officer taking police action after taking into account all

¹ *Houston v. Hill*, 482 U.S. 451, 461 (1987).

² *Chaplinsky v. New Hampshire*, 315 U.S. 568, 573 (1942).

³ *Collen v. Kentucky*, 407 U.S. 104 (1972).

relevant factors, i.e., the matter being investigated, the location, size and actions of the crowd, the time of day, and the lighting. This zone of safety should only encompass the physical space necessary to safely perform police operations. As a practical matter, a reasonable zone of safety would be at a minimum, the span of an officer's arms when he or she is engaged in enforcement activities (i.e. arrest, summons, etc.).⁴

When an individual is **NOT** at a safe distance and is endangering the Member of the Service or others, or is actually interfering with the police action, the officer should immediately issue a warning. Acceptable warnings include:

- Please step back!
- Please get on the sidewalk!
- Please step away from the arrest van!

According to the New York State Penal Law, "a person is guilty of obstructing governmental administration when he . . . prevents or attempts to prevent a public servant from performing an official function, by means of intimidation, physical force or interference, or by means of any independently unlawful act"⁵ If the individual does not obey the warning **AND** one of the following situations is present, an arrest for OGA may be appropriate:

- The individual is touching or physically interfering with the officers or suspect (i.e. using a camera so close to the officer's face that it intentionally obstructs his or her view and prevents the officer from performing his or her duty);
- The individual is unreasonably encroaching in the immediate area in which the enforcement action is occurring **AND** refuses to obey an order to move back; or
- The individual is engaging in passive, non-violent behavior but is still purposefully blocking or preventing the officer from taking enforcement action (i.e. blocking a prisoner van).

E. Permissible Seizure of Recordings and/or Recording Devices

When a police officer has probable cause to believe that a recording contains evidence of a crime, he or she should:

- Inform the observer that the recording is believed to contain evidence of a crime, and ask for consent to examine the recording. It should be noted that this consent to view must be freely and voluntarily given. Officers should be prepared for a subsequent court assessment to ensure that this consent was not coerced, either implicitly or explicitly.⁶
 - Note: It may be possible for the observer to email the recording directly to the officer's Department-issued smartphone.
- If the observer refuses, the officer should inform the observer that he or she will seek a

⁴ Examples of "zone of safety" intrusions

- An individual enters an "obvious, defined area of police activity" and tips off others that the police are approaching. See, People v. Covington, 18 A.D.3d 65, 71 (1st Dep't. 2005).
- A group of onlookers encircle an officer attempting to make an arrest thereby allowing the person to escape. See, People v. Shea, 68 Misc. 2d 271 (N.Y. Spec Sess. 1971).
- Approaching an officer from behind in a threatening manner while the officer was attempting to make an arrest. See, People v. Tarver, 188 A.D.2d 938 (3rd Dep't. 1992).
- An observer physically placing him/herself between an officer and other individuals and ignoring repeated requests to move. See, People v. Jimenez, 138 Misc. 2d 867 (N.Y. Crim. Ct. 1988); People v. Yarbrough, 19 Misc. 3d 520 (N.Y. Sup. Ct. 2008).

⁵ N.Y. PENAL LAW § 195.05.

⁶ Schneekloth v. Bustamonte, 412 U.S. 218, 228 (1973).

search warrant for the device, and if the observer deletes the content the observer may be charged with tampering with physical evidence in violation of N.Y. Penal Law § 215.40.

- If the officer has reason to believe that the observer will delete the recording, he or she may seize the device, *without* looking into the device, and only for the time necessary to secure a warrant. In these types of seizures, the officer **MAY NOT** view the recording before obtaining the search warrant.

Under no circumstances should a Member of the Service seize a recording device merely because it has captured a law enforcement encounter. The seizure of the device would only be appropriate in circumstances where the officer has probable cause to believe that the recording captures evidence of an actual crime (i.e. assault on a police officer, an assault on a third party, possession of a weapon, etc.). Seizure of any recording device **MUST** be approved by a supervisor. In addition, it is a violation of N.Y. Penal Law § 215.40 for an officer to delete any video from a seized recording device.

F. Duties of Supervisors

In situations where an observer is arrested for interference with police action or where the contents of a recording device are believed to contain evidence of a crime, Members of the Service **MUST** request a supervisor to respond to the scene. This is in addition to officers' responsibilities to have the validity of an arrest verified prior to removal to the stationhouse, as explained in Patrol Guide Procedure No. 208-02.

Front line supervision is a critical component in protecting the constitutional rights of observers. Supervisors **MUST** be familiar with this Bulletin and be prepared to take immediate remedial action in the field to ensure the constitutional rights of individuals are protected. This should be balanced with the priority to ensure the safety of the police officers and the public involved in police action.

V. CONCLUSION

As a general matter, the recording of officers during the performance of their duties is not a violation of the law, so long as this recording does not amount to an *actual* interference with the police activity. Members of the Service are reminded that the courts have consistently held that police officers, as agents of the state, must tolerate a higher level of verbal criticism and potentially offensive language than an ordinary citizen.⁷ Nevertheless, this does not mean that Members of the Service must wait until they are placed in serious jeopardy or imminent danger before taking affirmative action to protect themselves and safely complete the enforcement action that they are undertaking. However, in cases that implicate the constitutional rights of observers, officers must be able to clearly articulate the manner in which the observer engaged in *actual* interference of the police activity that lead to action being taken against the observer, and/or why it was necessary to seize any recording or recording device.

Members of the Service are encouraged to contact the Legal Bureau at (646) 610-5400 with any questions about the content of this Bulletin.

This bulletin was updated May 20, 2016.

⁷ See, e.g., *Duran v. Douglas*, 904 F.2d 1372, 1377-78 (9th Cir. 1990) (An individual who was making obscene gestures and yelled profanities at an officer engaged in conduct that "fell squarely within the protective umbrella of the First Amendment, and any action to punish or deter such speech – such as stopping or harassing the speaker – is categorically prohibited by the Constitution").